Editor's note: 88 I.D. 275; Appealed - remanded, Civ.No. R-81-68 (D. Nev. May 12, 1982), 543 F.Supp. 158; aff'd, No. 82-4309 (9th Cir. Aug. 22, 1983) 714 F.2d 90

HOLLAND LIVESTOCK RANCH
AND JOHN J. CASEY
88 I.D. 772

IBLA 80-516 Decided February 19, 1981

Appeal from a decision of Administrative Law Judge Dean F. Ratzman finding appellants liable for willful and repeated grazing trespasses and revoking certain of appellants' grazing privileges for a period of 8 years.

Affirmed.

1. Administrative Procedure: Burden of Proof-- Administrative Procedure: Decisions--Administrative Procedure: Hearings--Evidence: Burden of Proof-- Evidence: Sufficiency

After holding a hearing pursuant to the Administrative Procedure Act, an Administrative Law Judge may properly find that an individual has committed a grazing trespass if that finding is in accordance with, and supported by, reliable, probative and substantial evidence.

Where the evidence as to specific trespass indicates that, of a number of

cattle counted, some were located on intermingled private land, but there were no barriers, either natural or artificial, which would have prevented the cattle on private land from going onto the public land, it is proper to find that all cattle counted would tend to consume forage at a rate proportional to the ratio of forage available on private and public lands. The burden then shifts to the grazing licensee to rebut this presumption.

2. Grazing Permits and Licenses: Trespass--Trespass: Generally

In determining whether grazing trespasses are "willful," intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his or or her conduct was so lacking in reasonableness or responsibility that it became reckless or negligent.

3. Administrative Procedure: Hearings--Evidence: Generally --Grazing Permits and Licenses: Hearings--Hearings

Settlement agreements compromising prior trepasses may be considered an admission of liability only where, by the terms of a settlement, liability is admitted. Where, however, liability has been initially determined in a Departmental adjudication, such a determination is properly considered in a subsequent hearing. As probative of the issue of "repeated" violations, absent a stipulated settlement which expressly vacates the factual determinations made in the prior adjudication.

APPEARANCES: Thomas L. Belaustegui, Esq., Johnson, Belaustegui & Robison, P.C., Reno, Nevada, for appellants; Burton J. Stanley, Esq.,

U.S. Department of the Interior, Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

This appeal arises from the decision of Administrative Law Judge Dean F. Ratzman, dated February 14, 1980, directing Holland Livestock Ranch and John J. Casey to pay $1,400 for willful and repeated trespasses, plus $2,870.90 for impoundment costs, and revoking appellants' grazing privileges for a period of 8 years. 1/

The decision below involves a number of trespasses in the Buffalo Hills Allotment, the Granite Mountain Fire Rehabilitation Closure Area of the Buffalo Hills Allotment, and the Wild Horse Closure Area of the Buffalo Hills Allotment. Appellants own, lease, or control areas of private land that intermingles with certain public lands.

The issues set out by appellants on appeal are as follows:

A. Whether the finding of trespass by the Administrative Law Judge was supported by substantial evidence in the record.

B. Whether the decision was erroneous as a matter of law.

1/ Holland Livestock Ranch is a co-partnership composed of three corporations: Bright-Holland Co., Maremont-Holland Co., and Nemeroff-Holland Co. John J. Casey owns a controlling interest in all three.

C. Whether the evidence of record shows that willfulness was established in the record.

D. Whether reliance upon certain prior "trespasses" to establish "repeatedness" was proper.

The issues that are pertinent in our resolution of the case at bar will be discussed with respect to the findings and conclusions of the decision appealed from and the pertinent arguments presented by the appellants in their briefs.

We adopt, in its entirety, Judge Ratzman's summary of facts as follows:

> A stipulation entered into by the parties (Exhibit 1) covered a number of matters. In the stipulation it is agreed that the following brands and earmarks were registered to Holland Livestock and/or John J. Casey. A circle on the left rib and hip combined with an earmark consisting of a split left split right; combination TF brand on the left hip and a spade brand on the left hip and left rib both used in conjunction with an earmark consisting of a split right ear and a cropped left ear.
>
> The stipulation describes activities of James G. Hansen, a BLM Range Technician, who counted 127 cattle within the Granite Mountain Fire Rehabilitation Closure Area on July 19, 1977. Of these cattle one cow had a circle brand on the left hip, five cows displayed a combination TF brand on the left hip, and 36 cows had a spade brand on the left hip. These cattle were either on public lands or private lands with unrestricted access to public lands in the closure area. In addition Mr. Hansen saw on August 23, 1977, a cow and a calf with spade brands on the left hip and eight cows and three calves with cropped left split right earmarks, all on public lands or private lands

with unrestricted access to public lands. He also observed 106 cows, six bulls and 38 calves on August 23 and 24, 1977, but was unable to identify them.

Work by BLM employee Brad Hines described in the stipulation is as follows: He discovered 78 cows and five bulls with a spade brand on the left hip, and a cow with a combination TF brand on the left hip, on public lands or on private lands with unrestricted access to public lands on September 14, 1977. Forty unidentifiable cattle were also found.

The stipulation sets forth that P. Edward Ryan, a BLM Natural Resource Specialist, saw two cows with spade brands on the left hip and two cows with cropped left split right earmarks in the Granite Mountain Fire Rehabilitation Closure Area on January 17, 1978. The cattle were on public lands or on private lands with unrestricted access to public lands. On January 18, 1978, he found 39 cows and four bulls with a cropped left split right earmark and two cows with a spade brand on the left hip, in the Squaw Valley area and on the west side of the Smoke Creek Desert in the Buffalo Hills Planning Unit. They were on public lands or private lands with unrestricted acess to public lands. Although 192 cattle were seen on January 17 and 18, 1978, Mr. Ryan was able to identify only 49 of them.

Mr. Ryan also found two cows with a spade brand on the left hip and 35 cows with cropped left split right earmarks in the Granite Mountain Fire Rehabilitation Area on January 25, 1978. On the next day he discovered a cow with a spade brand on the left hip and 20 cows with a cropped left split right earmark in the Squaw Valley and Smoke Creek Desert area. A total of 167 cattle were discovered on those days but only 58 were identified. All the cattle were on public lands or private lands with unrestricted access to public lands in an area closed to grazing.

The next part of the stipulation states that Michael S. McClellan, a BLM Natural Resource Specialist, saw 13 cows with a spade brand on the left hip and 23 cows with a cropped left split right earmark on March 8, 1978, in the Buffalo Hills Allotment on public lands or on private lands with unlimited access to public lands. None of the cattle were ear tagged. On March 9, 1978, 250 head of cattle were observed in the Buffalo Hills Planning Unit. On that day Mr. McClellan could identify 44 cows having a spade brand on the left hip and six with cropped left split right earmarks. These cattle were found on public lands. No ear tags were found on these cattle as required by respondent's grazing license.

A memorandum, dated June 22, 1978, from Ron Hall, a BLM Natural Resource Specialist, was also admitted into evidence. Ex. 1-A. The events discussed in the memorandum relate to the impoundment of 74 cows, bulls and yearlings, and 15 calves on June 13, 1978, from public lands or private lands with unrestricted access to public lands. A brand inspection was also made the following day June 14, 1978. A total of 123 cows, bulls and yearlings, and 24 calves were impounded on that day. Mr. Casey arrived on June 14 to claim all the animals. Notice was given to him not to place any untagged cattle above the Crutcher Canyon drift fence. The cattle were released to Mr. Casey and he drove them toward the Squaw Valley Ranch. The next day, June 15, 1978, BLM employees discovered 59 cattle (17 were untagged) immediately north of the Crutcher Canyon drift fence. On June 16, 1978, Mr. Casey was seen moving cattle toward the Crutcher Canyon drift fence.

As has been indicated, Exhibit 1 [-A] covers the actions of five BLM employees in finding and impounding Casey cattle in the period June 13 through June 15, 1978. An itemized list of the impoundment costs involved in this contest, totaled $2,870.90 Ex. 1-B. An outline of the percentage of lands in Federal ownership in comparison to private ownership was also entered into the record. This outline disclosed the following percentages in the Closure Areas of the Buffalo Hills Allotment:

1. Summary of Acreage Carrying Capacity in the Granite Mountain Rehabilitation Closure Area.

Ownership	Acres	% of Total	AUMs	% of Total
Public Land	39,120	85	3,481	60
J. Casey Land (unfenced)	7,220	15	2,311	40
	46,340	100	5,792	100

2. Summary of Acreage and Estimated Carrying Capacity in the "Horse" Closure Area.

Ownership	Acres *	% of Total	Est. Carrying Capacity *	% of Total
Public Land	159,219	95	11,387	96
Unfenced Private	9,170	5	453	4
Total	168,389	100	11,840	100

* These figures exclude the playa of the Smoke Creek Desert.

Brad Hines, the Supervisory Range Conservationist for the BLM in the Sonoma-Gerlach Resource Area, testified he is familiar with the Buffalo Hills Planning Unit. Tr. 11. He identified grazing licenses issued to the respondent

during 1977, 1978 and 1979. Ex. 6 and 7. There are three users in the Buffalo Hills Allotment. Tr. 13.

On July 15, 1977, Bob Neary and Brad Hines flew over the Closure Area and found 70 to 80 cattle in the burn Closure Area of the Buffalo Hills Allotment. A ground count was made on July 19, 1977 by James Hansen. Tr. 15. Another ground count was made on August 23, 1977. On September 14, 1977, Mr. Hines conducted a ground surveillance and identified 84 cattle with Mr. Casey's brands or earmarks in the Granite Mountain Fire Rehabilitation Area. Mr. Hansen made a ground count on August 23 and August 24, 1977 and identified 91 cattle in that area. Tr. 17.

A Notice of Trespass was sent to Mr. Casey by certified mail but was returned unclaimed. Ex. 8, Tr. 18. Mr. Casey's record address is 2905 South Virginia Street, Reno, Nevada.

Prior to January 17, 1978, an aerial survey disclosed there were 200 cattle in the closed areas of the allotment. Another ground count was made by Ed Ryan on January 25 and 26, 1978. Tr. 24. On April 26, 1978 a ground count was made, while on June 2, 1978 an aerial flight over the area was made. Tr. 25. A Trespass Notice was sent to Mr. Casey, January 16, 1978, but was returned unclaimed. Ex. 9.

A Notice of Closure of Federally Owned or Controlled Lands to Livestock Grazing (Ex. 10) was published in the Review-Miner, a weekly newspaper published in Lovelock, Nevada, in May 1978. The ban against grazing in the Horse Closure Area commenced on April 30, 1978. Mr. Hines personally informed Mr. Casey about the closure before it went into effect. Tr. 31. A certified letter notifying Mr. Casey of the closure was sent to him but was returned unclaimed. Ex. 11, Tr. 32.

On September 14, 1977, Mr. Hines met Jeanie Hunt, an employee of Mr. Casey, on the Granite Ranch when he was in the vicinity counting cattle. Tr. 33. Ms. Hunt informed Mr. Hines that there were no cattle north of the Granite Ranch. However, a subsequent count on the same day revealed there were 124 cattle belonging to Mr. Casey north of that ranch. Tr. 34.

With respect to alleged trespasses occurring in January, 1978, Mr. Hines made a phone call to Ms. Hunt on January 13, 1978 and told her that all livestock in the burn closure area were considered to be in trespass and that they should be removed. Tr. 35. On January 19, 1978, Mr. Casey contacted Mr. Hines and asked for a license to

graze 200 cattle, which was the approximate number of cattle found in trespass. Mr. Casey was told where his cattle were and that any cattle in the burn closure area were in trespass. Mr. Hines refused to grant Mr. Casey's request. Tr. 35.

At a later meeting with Mr. Casey in Gerlach, Nevada, on June 6, 1978, Mr. Hines notified Mr. Casey that the cattle left on the range during a seven day period (the Bureau had agreed not to impound trespassing cattle in that period) were considered in willful trespass. Tr. 37. The explanation given by the latter for the continued trespasses was that he could not find any help to assist him in removing the cattle.

Mr. Chet Conard, District Manager of the BLM Winnemucca District, testified he received a phone call from Mr. Casey on June 12, 1978. At that time, Mr. Casey stated he had just rounded up approximately 300 head of livestock from the closed area and that there was no need to make further aerial inspections. Tr. 50. Mr. Conard informed Mr. Casey that the seven day extension granted to round up the trespassing cattle had expired. Tr. 50.

Dave Boyles, a horse wrangler with the BLM, was in the Granite Fire Rehabilitation Closure Area from June 6 through June 13, 1978. Tr. 56. He found cattle there at that time but neither Mr. Casey nor any of his employees were seen in the area. Tr. 57. While riding along the Crutcher drift fence, Mr. Boyles found several gates open that allowed cattle to cross into the closed area. Tr. 60. Openings in parts of the fence were also found. He counted 54 head of cattle on June 8 and 9, and impounded an estimated total of 137 on June 13, 1978. Tr. 66. No evidence was found to indicate the additional cattle came through openings in the fence or through open gates that he inspected. Tr. 67.

Mr. Ron Hall, a Wild Horse Specialist with the BLM, was also in the Buffalo Hills allotment on June 6 through 13, 1978. He identified 54 cattle with Casey brands and earmarks on June 8 and 9. Tr. 69. Neither Mr. Casey nor any of his employees were seen in the area removing cattle during that time. Mr. Casey signed a statement acknowledging that all the cattle impounded on June 13 and 14, 1978, belonged to him. Ex. 12, Tr. 70.

Michael Scott McClellan, a Natural Resource Specialist for the BLM, talked to Mr. Casey on March 8, 1978 at a location north of the Deep Hole Ranch. Cattle were seen scatteread throughout the surrounding area. Mr. Casey

admitted the cattle belonged to him. Tr. 73. The cattle were not eartagged, which violated a requirement in effect at that time. Mr. Casey stated he turned cattle out of Deep Hole Ranch himself because of muddy conditions at that ranch, and asserted that most of the land up to the Clear Creek Ranch belonged to him. Tr. 76. The land between the ranches is unfenced. Tr. 76. Mr. McClellan concluded that Casey cattle were in trespass and personally served Mr. Casey with a Trespass Notice on March 9, 1978. Ex. 13.

George Cramer, an employee of Mr. Casey during 1978, was not assigned responsibilities in controlling cattle in the closure area. Tr. 30. He moved cattle from Squaw Valley to above the Crutcher fence on two occasions. Tr. 40. The first time was around June 9, 1978. Tr. 31. Several days later he moved the same cattle. Tr. 32. Perhaps 100 head of cattle were moved a quarter of a mile above the fence the second time. Tr. 34. He believes the cattle could have returned through open gates along the fence. Mr. Casey worked with Mr. Cramer on both occasions when the cattle were moved.

On cross-examination, Mr. Cramer testified that Mr. Casey instructed him to keep the cattle above the Crutcher drift fence. Tr. 43. However, some cattle would stray down to the area below the fence. Mr. Cramer split his duty among several of the ranches belonging to Mr. Casey. Tr. 44. He would ride over to the burn closure area about once a month to search for cattle. The area was relatively empty of cattle. Every time he came back to the Fly Ranch he found the gates open. Tr. 66. He also helped repair and maintain fence at that property.

Mr. Cramer's estimate of the number of cattle moved on June 10, 1978, was 500. Tr. 49. He did not attempt to lock any of the gates that were left open, because he had concluded that it "would do no good." Tr. 53.

Mr. John J. Casey, the respondent, testified that his principal residence in 1978 was in Gerlach. Tr. 55. He uses his motel in Reno as a clearinghouse for all the mail he receives. He is there once a month. He stated that he has asked the BLM to send mail on an unrestricted basis so that his employees could pick it up. Tr. 56. He has had "manager problems," and conceded that in some instances the mail has not been properly handled. He believes that he was granted an extension of time to remove cattle which included June 13, 1978. Tr. 57. He testified that he was continuously in the closure area near Squaw Valley from June 6 to 13 removing cattle. Tr. 58. Mr. Casey contends he had ten persons help him remove cattle during that time.

However, he could not provide the names of some, or state exactly how long each of them assisted him. Tr. 59. He believes that the cattle impounded after being found in the closure area walked back across the cattle guard into that area. He saw cattle doing so. Tr. 61. A gate along the Crutcher fence was found knocked down. Tr. 62.

Mr. Casey estimated he had 15 people, full or part-time, assist him in caring for his cattle in January through July, 1978. Tr. 67. They helped with branding and generally assisted in keeping the cattle in the proper areas. Tr. 69. They also shut any open gates that they found. Tr. 70. Mr. Casey believes he owns 10,000 acres of unfenced land in the Granite Mountain Fire Rehabilitation Closure Area and another 10,0000 acres of unfenced land in the Horse Closure Area. Tr. 71.

During cross-examination, Mr. Casey said that he has had problems with horses breaking down gates and hunters leaving gates open. Tr. 76. He has known about these problems since 1970. In order to correct these problems, he has removed gates and replaced them with sections of fence. Tr. 76. When asked whether he was doing enough to keep cattle out of closed areas, Mr. Casey replied, "I sure am not." Tr. 79. He believes that to reduce trespassing he must remove 99 percent of the gates from the fences, and persuade the Bureau to remove wild horses. Tr. 79. He contends that he removed ten gates in 1977 and through June, 1978. In addition, he asserted that he has offered to place padlocks on the gates but did not receive cooperation from the Bureau. He will not install cattle guards because he believes they are ineffective. Tr. 80.

Mr. Casey blames his difficulties in receiving mail from the BLM in the last five or six years on a practice by the agency of transmitting it with instructions for restricted delivery. In his view the Bureau does not want him to receive some mail (he has asserted that the Bureau is trying to put him out of business). He also believes that at times his employees have been at fault in not picking up the mail. He denied that he has instructed his employees to reject certified mail from the BLM. On the other hand, several certified letters from the BLM, sent May, 1979, were exhibited to Mr. Casey at the hearing. Ex. R-2. These letters were sent unrestricted delivery and both were returned unclaimed. Mr. Casey explained the reason for not receiving the certified letters on the need for someone to go to the post office to get them, and his understanding that "there's a lot of times when she can't get away." Tr. 90.

The respondent believes he removed 400 to 500 cattle from the closure areas in the period June 6 to 13, 1978. Tr. 92. He contends the majority were removed from his fields or other privately owned lands. He bases his opinion on estimates he has made using the odometer in a pickup truck. Tr. 94. Moreover, he maintains he was on the range every day from June 6 to 13, 1978, rounding up cattle. In regard to the cattle impounded on June 13, 1978, Mr. Casey stated they were all above the Crutcher drift fence prior to that day. He indicated that 147 cattle could negotiate the cattle guard in one hour. Tr. 96.

Mr. Casey is aware that there is unrestricted access to public lands from unfenced lands he owns. Tr. 97. He contends that he tries not to use his privately owned unfenced lands. Tr. 98. He does not obtain exchange of use permits because he believes they are issued on an inequitable basis. Although he moved cattle from Deep Hole to Clear Creek in March, 1978, the cattle were not eartagged nor was a trailing permit sought. Mr. Casey testified that it was not his intention to go on public land at that time. Tr. 101. His position is that he is unable to control cattle trespass because there are so many gates in the area. Despite this, he will try to keep cattle out of closed areas. Tr. 103. He stated that he has done everything within reason to keep cattle where they belong. Tr. 105.

According to Mr. Casey, the cattle re-enter the closed area because the feed is a lot better there. In addition, some of the cattle were raised in the closed area. Tr. 107. He conducts no regular program of fence inspection in the trespass areas. Before the closing of the areas he did not have problems with trespassing cattle. He has 1300 head of cattle on the area under consideration at the present time. Tr. 109. He asserts that the only effective way of keeping cattle from finding their way through the fence and getting into the closure area would be to patrol the fence continuously. Tr. 110. The Crutcher drift fence is approximately 15 miles long. Mr. Casey believes locking the gates would be ineffective since people would cut down a part of the fence to get through. Tr. 111.

Andrew Fleming Jackson testified that at times three of his children worked on Mr. Casey's ranch from June 1977 to June 1978. He is aware of the gate problem on the Granite Mountain drift fence and the Crutcher Canyon drift fence. Tr. 115. andrea Jackson testified she helped Mr. Casey move his cattle a couple of times in the period June 1977 to June 1978. Tr. 120. She and her brothers

were not paid for their help. She has seen some of Mr. Casey's cattle in the burn area. Tr. 122.

A notice of Closure of the Granite Mountain Fire Rehabilitation Area, effective June 24, 1975, was published in the Review-Miner in Lovelock, Nevada, June, 1975. Ex. 4. This notice was also published in June, 1975 in the Nevada State Journal.

Grazing licenses issued to Mr. Casey in 1977 and 1978 were entered into the record. Ex. 6 and 7. These licenses state:

> Livestock use is not authorized in the area of the Granite Mountain Rehabilitation Project, described as that area south of the Granite Mountain Drift Fence.
>
> * * * * * *
>
> Only cattle bearing BLM issued ear tags will be authorized to graze on the Buffalo Hills Allotment after 3-1-78.

A Winnemucca Grazing District Advisory Board recommendation, concurred in by the BLM District Manager, placed maintenance responsibility for the Crutcher Canyon seasonal fence on Holland Livestock Ranch (owned by Mr. Casey) on April 30, 1968. Ex. 22d.

On appeal, appellants argue that "[i]n all prior proceedings between the parties, whenever a trespass has been found, it has been based upon direct evidence of actual trespass. In this proceeding, however, the Government seeks to establish the alleged trespass solely upon the Access Theory." Appellants contend that a presumption of trespass is not applicable in the instant case.

[1] Appellants misapprehend the nature and function of what they term the "access theory." The access theory is not a rule of positive law which requires a finding of trespass from the mere recitation that

the grazing animals had "unrestricted access to" public lands. Rather, it is a rebuttable presumption which is drawn after the fact of unrestricted access is shown.

In Home Insurance Co. v. Weide, 78 U.S. (11 Wall.) 438, 441 (1870), the United States Supreme Court defined a presumption to be "an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known." As such, presumptions "place upon the adverse party the burden of offering further evidence in the sense that a verdict will be directed against him if he does not, but they do not affect the ultimate burden of proof, as to the preponderance of the evidence required." Sowizral v. Hughes, 333 F.2d 829, 833 (3d Cir. 1964) quoting Prosser on Torts, § 41, at 197 (2d ed. 1955).

Thus, "creation of a presumption is inevitably designed to affect the burden of proof by shifting it from the party possessed of the procedural device to his adversary." Brown v. Oklahoma Transportation Co., 588 P.2d 595, 601 (Okla. App. 1978). The effect of this shift is that "if proof of the basic facts are introduced into evidence, the presumed fact is also taken to be proved in the absence of evidence to the contrary." State v. Jones, 88 N.M. 107, 537 P.2d 1006 (1975). Accord, Connizzo v. General American Life Ins. Co., 520 S.W.2d 661, 665 (Mo. App. 1975).

The presumption which arises from the presence of cattle on intermixed Federal and private lands is premised on the realization that "[a]s the boundaries between the Federal Range and private lands [are] of a legal rather than a physical nature it strains credibility to believe that the animals grazing would respect the same." Midland Livestock Co., 10 IBLA 389, 402 (1973). It is common knowledge that an unrestrained hungry cow will migrate to an area where forage is available. See Alton Morrell and Sons, 72 I.D. 100 (1965).

We reject appellant's assertion that the presumption herein is a substitute for actual factfinding, where "substantial" evidence of a reliable nature is required. The stipulation agreed to in Exhibit 1 sets out the facts and brings this case clearly within the scope of the presumption as delineated in Bureau of Land Management v. Babcock, 32 IBLA 174, 183-84, 84 I.D. 475, 479-80 (1977). The Board noted in Babcock, supra, that:

> Appellant's land is included in an allotment with federal land. Within the allotment, no physical barriers separate the private land from the federal land. In the absence of any effective restraint, appellant's cattle were free to graze throughout the allotment. In the absence of evidence to the contrary, as we indicated, it is therefore reasonable to conclude that of the total forage consumed by appellant's cattle, federal forage comprised the same percentage as it comprised of the total forage available in the allotment, i.e., 33 percent.

32 IBLA at 184, 84 I.D. at 480.

This same presumption has been used to calculate damages in other grazing trespass cases involving allotments with mixed Federal and private lands. See, e.g., Nick Chournos, A-29040 (November 6, 1962); J. Leonard Neal, 66 I.D. 215 (1959).

Appellants assert that the Government's reference to the decision in Holland Livestock Ranch v. United States, United States District Court, District of Nevada, Order and Summary Judgment, Civil No. R-79-78BRT, August 7, 1979, is inaccurate to the extent that it suggests affirmance of the "access" theory of trespass.

The District Court in Holland Livestock Ranch v. United States, supra, affirmed the "access theory of trespass" when it granted order and summary judgment for the Government. The order stated that:

> The court having read and considered the administrative record lodged with the court, the testimony taken at the time of the hearing on the preliminary Injunction and the memoranda of points and Authority submitted by the parties hereto and good cause appearing therefore.
>
> * * * * * * *
>
> It is Further ordered and adjudged that Defendants motion for Summary Judgment be and the same is hereby granted.

It is well settled that a motion for Summary Judgment lies whenever there is no genuine issue as to any material fact. It may be made on the pleadings or the record or it may be supported by affidavits. The motion strikes at the heart of the claim. Clearly, if

the decision below is premised on an erroneous theory of law, the decision will be set aside. By the grant of summary judgment in Holland Livestock Ranch v. United States, supra, the Court not only affirmed the result of the prior Board decision in Bureau of Land Management v. Holland Livestock Ranch, 39 IBLA 272, 86 I.D. 133 (1979), it also affirmed, perforce of logic, the legal theory upon which the Board's decision was based. That legal theory included the presumption of trespass arising from unrestricted access.

The stipulation which was entered into evidence, as well as the testimony of the BLM employees, clearly established a basis upon which to utilize this presumption. It then became appellants' obligation to show either that the underlying predicate of the presumption (i.e., unrestricted access) did not, in fact, exist, or alternatively that other factors, such as the presence or absence of springs or forage, or supervision by appellant or his employees of the cattle's movements rebutted the presumption.

We note that, on appeal, appellants argue that this case is different from the other cases previously decided by the Board which involved the access presumption. Thus, they argue that the forage was superior on the private lands, that the greater bulk of the available water was on private lands, and that fences impaired access to Federal lands. Accordingly, they contend that any presumption which may arise was effectively overcome by their testimony and evidentiary submissions. We do not agree.

Concerning forage, for example, Exhibit 3 indicates that appellants' forage was 40 percent of the total in the Granite Mountain Fire Rehabilitation Closure Area and 4 percent of the total in the Buffalo Hills Horse Closure Area. These figures only include the carrying capacity of appellants' unfenced lands, a point to which we will return later. Suffice it to note that, while an insignificant amount of available forage on the Federal range would certainly undercut any presumption based upon unimpeded access, percentages of 60 and 96, respectively, are clearly above any level where this concern might be deemed relevant. Further, it is important to point out that the percentage of forage available on private lands is utilized in computing the amount of trespass assessed.

With respect to water sources, we note that while Casey did testify that 95 percent of the waters in the Squaw Valley area were located on his private lands, this answer was stricken by Judge Ratzman (2 Tr. 72-73). Moreover, Orthophoto Quad maps submitted after the close of the hearing indicate that over the entire two closure areas, 59 percent of the water resources are located on public lands, 34 percent are on appellants' lands and 7 percent are on other privately held lands. Admittedly, these figures suffer from two infirmities. They are not site specific to the areas of the trespasses and they do not relate to the quantity of available water at any specific source. Nevertheless, it was appellants' responsibility to introduce evidence that would

establish the existence of water sources such as would overcome the presumption of trespass. This they did not do. 2/

Finally, as regards the question of access to the Federal range from fenced privately held land, appellant is apparently arguing that the cattle which were trespassed were actually located on privately fenced lands in which the gates were either open or destroyed or where the fence itself was cut. The Government strongly disputes this contention and argues that none of the cattle trespassed were located within the privately fenced areas. Our reading of the record supports the Government's view.

The testimony relating to open gates and cut fences related not only to the fences located on appellants' privately owned lands, it clearly also referred to the Crutcher Canyon Drift Fence and the Granite Mountain Drift Fence (1 Tr. 60-65, 67; 2 Tr. 26, 33-34, 48, 50). The stipulation entered as Exhibit 1 repeatedly used the expression, "These cows [or cattle] were observed on public lands or private lands with unrestricted access to public lands in an area closed to grazing." Had the cattle been located on fenced lands, even fenced lands with open gates or cut segments, the cattle would not have unrestricted access to Federal lands. At the beginning of the first hearing counsel attempted to define precisely what was meant by the stipulation. The following colloquy ensued:

2/ Orthophoto Quad maps 2 and 6, however, do indicate the presence of a number of water sources located on Federal lands within the Squaw Valley area.

MR. LEE: Your Honor, we have agreed to this stipulation, and we have agreed to clarify for the record specifically what certain language means so that there is no confusion from your standpoint, or perhaps later at an appellate level, as to what is intended specifically by the language that basically concludes each paragraph, starting with the trespasses. And I think the first time it appears is on page 2, commencing at line 5, where it states, "These cattle were observed on public lands or private lands with unrestricted access to public lands in an area closed to grazing."

Now, that phrase is repeated throughout the stipulation by means of identifying the location where the cattle were observed. It is our intention that this -- regardless of what the syntax may be or the phrasing -- that the language specifically is to mean that the cattle were observed in the general area described, which is comprised of or consists of both public and private lands, and that no attempt was made to determine whether the cattle were on public or private lands; but that where the cattle were located in that area, they had unrestricted access to public lands that were within the closure area. Is that correct, Burt?

MR. STANLEY: That's correct. In further clarification, the language here is perhaps to cover the factual situation set forth in the Babcock case and in IBLA's decision in the John Casey case, the latest one.

JUDGE RATZMAN: This was the last February--

MR. STANLEY: That's correct. I'll be putting that into evidence, Your Honor. Which basically said that the access theory of trespass is a viable one.

JUDGE RATZMAN: This was Judge Sweitzer and Judge Luoma being considered at the same time by the Board.

MR. STANLEY: That's correct.

JUDGE RATZMAN: Yes. I'm familiar with that. Is there anything other than that respecting Exhibit 1 and the attachments?

Exhibit 1 is received in evidence pursuant to stipulation of the counsel in this case. And the receipt will be subject to the reservation expressed by Mr. Lee, which in effect is a clarification of the general area and a relation to definitive statements made about the law, which will be applied to such areas. And it will be a matter for me to look at the cases and for counsel to

> address the matter in briefs, as far as how it would be applied in this case. [Emphasis supplied.]

(1 Tr. 5-6).

The two cases to which the Government's attorney adverted are Bureau of Land Management v. Babcock, supra, and Bureau of Land Management v. Holland Livestock Ranch, supra. Both of these cases involved situations in which the trespassing cattle were not on fenced private lands. See Bureau of Land Management v. Babcock, supra at 184, 84 I.D. at 480; Bureau of Land Management v. Holland Livestock Ranch, supra at 282-86, 86 I.D. at 138-40. Thus, it seems clear that the Government was not attempting to trespass animals which were either on appellants' private fenced lands or north of the two drift fences, even where the fences had open gates or missing sections.

Moreover, if the Government was attempting to trespass such animals, Exhibit 3, which computes the relative percentages of the forage available on both the Federal and private lands would have been drafted to include the forage available on the privately fenced areas, in determining the proportional rate that the forage could be presumed to have been consumed by the trespassing cattle. Exhibit 3 actually expressly excluded the privately owned lands that were fenced from its computational base.

The discussions at the two hearings concerning the condition of the various fences were not designed to justify the trespassing of

cattle which were observed within fenced lands. Rather, they were attempts to explain how the cattle came to be on the Federal range or on unfenced private lands. Thus, we find that the question of the condition of the fences is not relevant herein to the applicability of the presumption which arises from unrestricted access.

We find, therefore, that the evidence adduced at the hearing clearly supports Judge Ratzman's determination that the trespasses did in fact occur.

[2] We must now examine the nature of the trespasses. Appellants argue that the "willfulness" of the trespasses was not established in this case. The quantum and nature of the evidence required as a prerequisite to a finding of "willfulness" has been examined in a number of prior decisions.

In determining whether grazing trespasses are willful, intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that a licensee's conduct was so lacking in reasonableness or responsibility that it became reckless or negligent. Herrara v. Bureau of Land Management, 38 IBLA 262, 267 (1978); Eldon Brinkerhoff, 24 IBLA 324, 337, 83 I.D. 185, 190 (1976). J. Leonard Neal, supra at 215.

Where the number of cattle grazing on the Federal range exceeds the number allowed by license and such excess is attributable solely to a permittee's lack of control over his cattle and lack of diligence in taking corrective action after being informed by the Bureau of Land Management that the excess existed a finding of willful trespass is warranted. Cesar and Robert Siard, 26 IBLA 29 (1976). The repetitive nature of grazing trespasses coupled with a negligent failure of permittee to take corrective action supports a finding of willful trespass. Calvin C. Johnson, 35 IBLA 306, 315 (1978).

Appellants argue that both Casey and his former employee Cramer testified to difficulties in keeping the gates closed and to their attempts to restrain appellants' cattle from entering into the closure areas. There is, indeed, much testimony by Casey relating his problems and attempts to rectify them. We note, however, that Judge Ratzman, who had heard all of the evidence, clearly did not believe Casey's testimony. Thus, Judge Ratzman declared:

> I find that the respondent's trespasses were willful and repeated over a long period of time. Beginning in July of 1977 and continuing through June of 1978, cattle owned by Mr. Casey were in trespass time after time in areas closed to grazing. Large numbers, at times in the hundreds, were in trespass on the Federal Range. Mr. Casey knew or should have known of the problem, but made no diligent efforts to control his cattle. His cavalier attitude toward his obligations under grazing licenses is exemplified by his failure to establish a reliable method for the receipt of notices transmitted by the Bureau. Despite the shell and pea game that Mr. Casey plays with certified mail, it is clear that in some instances he received information about closed areas and particular trespasses. He was personally notified that there were

cattle in trespass in a period beginning June 6, 1978 on a designated closure area. Mr. Casey did not promptly remove all the cattle although he was given an extension of time to do so. Subsequently, a large number of his cattle were impounded. At no time did any BLM personnel during the week after June 6, 1978, see Mr. Casey or any of his employees rounding up and removing cattle from the closure area. If his testimony that he removed four or five hundred cattle (or more) in the second week of June, 1978, is to be believed, this only magnifies the extent of his trespass. His inability to keep cattle out of the closed areas, and his heavy reliance on volunteer or part-time help indicates the lack of a strong or sustained interest in prevention of trespasses.

Mr. Casey's uncooperative attitude is also exemplified by an occurrence on March 8, 1978. It was discovered at that time he was moving cattle from the Deep Hole Ranch without a trailing permit, and the cattle were not eartagged as required by his grazing license.

It is obvious that measures taken by Mr. Casey to remove his cattle from closed areas were ineffective since his own employee, Mr. Cramer, acknowledged that cattle would return to those areas within several days. Mr. Cramer was assigned to several ranches without fulltime assistance from other employees. I must conclude that no real effort was made to maintain control over the respondent's large herd of cattle. Although he was given the opportunity to submit tax records or other documents to establish the nature and duration of employment of persons who were hired to work on his ranch properties during the period in question, Mr. Casey elected to rely upon his general assertions.

The respondent's explanation for the repeated and significant trespasses was that there were a number of open gates on the Crutcher Canyon Drift Fence which allowed cattle to re-enter closed areas. An attempt to shift the blame for any cattle trespasses onto others who may have left gates open must be disregarded. John E. Walton, 8 IBLA 237, 238 (1972). He contended also that cattle guards which have been installed do not effectively keep cattle out. However, Mr. Casey has the responsibility of maintaining the Crutcher Canyon drift fence. His attitude seems to be that it is impossible to prevent the trespasses, although he acknowledged that patrolling along the fence would reduce the number of trespassing cattle.

In Bureau of Land Management v. Holland Livestock Ranch et. al., 39 IBLA 272, 297 the Interior Board of Land

Appeals set forth the history of respondent's trespasses, quoting a portion of a decision of the Chief Administrative Law Judge:

> On January 13, 1956, Respondent's grazing license in the Nevada Grazing District No. 3 was suspended for 3 months. On November 23, 1960, Respondent's licenses were again revoked and future licenses were denied to Respondent in that district. A continuous series of 14 trespass citations and warning letters issued to Respondent for the Susanville District, beginning with 1960 and extending into 1968, were noted and itemized in a decision issued on September 4, 1969. Nine trespass citations, issued in 1969 for the Susanville District, resulted in a suspension of Respondent's grazing privileges for 5 years. Thirty-five additional trespass citations resulted in additional show cause orders which were either closed through offer of settlement or by a November 17, 1971, agreement between Complainant and Respondent. Three trespass citations, issued to Respondent in December 1972 and January 1973, were closed through a monetary settlement at twice the commercial rate. Four trespass citations resulted in a decision issued on January 7, 1974, which asserted monetary settlement against Respondent at twice the commercial rate.
>
> Nineteen trespass citations were issued from January 17, 1975, through March 19, 1976 in the Susanville and Winnemucca Districts, and one impoundment action was initiated in the Winnemucca District which resulted in a hearing on May 4, 1976.
>
> Most of the above history is reflected in documents incorporated in the case record in this proceeding (Exhibits 14-21). The Administrative Law Judges in earlier decisions concluded that Mr. Casey failed to control his cattle, was negligent, or had proclivity to ignore range rules not comporting with his personal concepts. I conclude that he is an incorrigible trespasser upon the public lands.

(Decision at 15-17).

This Board has often noted the great deference which is accorded findings of Administrative Law Judges premised on conflicting testimony. See, e.g., United States v. Melluzzo, 32 IBLA 46 (1977), aff'd. Melluzzo v. Andrus, No. CIV-79-28-PHX-CAM (D. Ariz. May 20, 1980); State Director for Utah v. Dunham, 3 IBLA 155, 78 I.D. 272 (1971). This deference is based on the realization that the trier of fact, who presides over a hearing, has an opportunity to observe the witnesses and is in the best position to judge the weight to be accorded conflicting testimony. United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417-18 (1973). As was noted long ago in Creamer v. Bivert, 113 S.W. 118, 1120-21 (Mo. 1908):

> [O]ne witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.

See also First Federal Savings and Loan Ass'n of Fayetteville v. Federal Home Loan Bank Bd., 426 F. Supp. 454 (W.D. Ark. 1977); Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949).

Intrinsic to Judge Ratzman's finding of willfullness was his rejection of Casey's testimony. His findings are amply supported by the record and we wil not disturb them here.

[3] Appellants also contend that the Judge erred in finding that the trespasses were "repeated" in nature. Appellants argue alternately that some of the trespasses were too remote in time to be relevant, others (approximately 42) were closed through settlement and compromise and may not properly be considered, and still others have not been finally adjudicated by Federal courts (although final Departmental decisions have issued on these trespasses).

With respect to the 1956 suspension, we think appellants' objection that such occurrences were too remote to be utilized is well taken. We have greater difficulty with the appellants' argument relating to the use of settlement and compromises reached in prior proceedings. Appellants argue that "[w]hatever the terms of those compromises Casey respectfully argues that they are irrelevant and inadmissible in that, the terms being unknown, the risk is too great that Casey will be penalized for conduct which may in fact not warrant punishment" (Statement of Reasons at 21).

We note that Rule 408 of the Federal Rules of Evidence states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

The notes of the Advisory Committee on Proposed Rules make it plain that this rule encompasses completed settlements as well as offers and negotiations:

> While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

Fed. R. Evid. 408 Note (1976).

Clearly, therefore, the submission of compromise agreements for proof of liability is prohibited in Federal courts. Courts have long noted, however, the general rule that administrative agencies are not bound by the strict rules of evidence. Thus, hearsay evidence is generally admissible in administrative adjudication. See,e.g., Martin-Mendoza v. Immigration and Naturalization Service, 499 F.2d 918 (9th Cir. 1974); Brown v. Gamage, 377 F.2d 154 (D.C. Cir. 1967).

We do not perceive the general exception recognized by the courts as providing carte blanche to consider any or all evidence that an agency may desire. Rather, we believe the proper test is one which takes into consideration the policy justifications implicit in any rule and applies them given the specific needs and concerns of the agency.

The rationale for the exclusion of offers of settlement (and presumptively the settlements themselves) as manifested in Rule 408 rests

in the public policy favoring private resolution of disputes and thus avoidance of litigation. See Overseas Motors, Inc. v. Import Motors Limited, Inc., 375 F. Supp. 499, 536-37 (E.D. Mich. 1974). Moreover, one must recognize that often settlements are merely an indication "that peace was bought." Shipley v. Pittsburgh and Lake Erie R. Co., 83 F. Supp. 722, 762 (D. Pa. 1949).

Thus, the policy is one designed to increase the likelihood of amicable settlement of dispute prior to a resort to litigation, be it administrative or judicial. Taking this into consideration, we hold that all evidence relating to unsuccessful offers or negotiations aimed at achieving settlement must be excluded from consideration in agency adjudications. Accord, Sternberger v. United States, 401 F.2d 1012, 1017-18 (Ct. Cl. 1968); Cesar and Robert Siard, supra at 35.

We are less sanguine of the efficacy of an iron-clad exclusionary sale, however, when we turn to the question of the exclusion of settlement agreements themselves. Questions relating to the exclusion of consummated settlement agreements have generally arisen in the context of an attempt by a third party to introduce proof of a settlement between two other individuals in order to establish the liability of one of the parties signatory to the settlement. Courts have uniformly rejected these attempts. See, e.g., Jackson v. Shell Oil Co., 401 F.2d 639 (6th Cir. 1968); Bratt v. Western Air Lines, 169 F.2d 214 (10th Cir.), cert. denied, 335 U.S. 886 (1948). It seems obvious that, in any situation involving a multiplicity of parties, the admissibility

of actual settlement agreements would work to virtually preclude individual settlements among the various participants. Exclusion in such situations clearly serves the purpose of facilitating settlement of disputes.

The situation which arises in grazing matters, however, partakes of differing considerations. As we have already noted, the past history of a grazing licensee or permittee is of critical importance in determining the permissible level of sanctions imposed for various violations, since a prerequisite to a revocation or a suspension of significant privileges for a period of years is a finding that the trespasses were both willful and repeated. See Eldon Brinkerhoff, supra at 337, 83 I.D. at 190; Eldon L. Smith, A-30944 (Oct. 15, 1968). Total exclusion of all settlement agreements might well result in the refusal of BLM to enter into such arrangements, and thus work the result of actually inhibiting settlement agreements.

As an example, in any specific case BLM might initially determine that a trespass violation was willful. Under 43 CFR 4150.3(a)(2), the grazing licensee would be liable for twice the value of the forage consumed. The parties might subsequently agree that the willfulness of the trespass may not have been so clear. Accordingly, the parties would agree to settle the trespass as "nonwillful," the penalty for which is assessed only at the commercial value of the forage. See 43 CFR 4150.3(a)(1). If, however, the mere fact of settlement would preclude BLM from ever utilizing this trespass in the future to show a

repeated course of conduct, BLM might well refuse to settle all but the most minor of offenses, and instead proceed to trial.

We agree that the mere fact that a settlement was reached does not, ipso facto, constitute an admission of culpability on the part of the licensee. But we do believe that the documents of settlement are properly admitted to determine the nature of the agreement. Thus, to the extent that an agreement expressly admits liability it is properly considered as probative of the "repeated" nature of subsequent violations. On the other hand, to the extent that the documents expressly deny liability, they may not be utilized as probative of the issue of "repeated" violations.

Applying this formula to the case before us, we find that, to the extent that Judge Ratzman considered the dismissal of the suits filed by the Government in United States v. John J. Casey, Civ. No. S 2171 (D. Cal.) and United States v. John J. Casey, Civ. No. LV 1713 (D. Nev.) as an admission of liability such action was erroneous. The stipulated consent decree expressly disclaimed any admission of liability. See Exhibit 18A. However, to the extent that the stipulation entered into by appellants and the Government on November 17, 1971, and subsequent action by then Hearing Examiner Graydon Holt merely altered the penalty assessed in Judge Holt's decision in Holland Livestock Co., California 2-69-1 (SC), his findings of trespass represent a final administrative determination independent of any subsequent settlement arrangement. See Exhibits 17 and 18.

Appellants' attempt to exclude such factual determinations in Holland Livestock Co., California 2-69-1(SC), and in other similar cases is of no avail. The stipulation into which the parties entered could have expressly nullified Judge Holt's findings of trespass. The stipulation clearly did not so so. Moreover, appellants' argument, if carried to its logical conclusion, would compel the exclusion of trespass assessments even where they had been affirmed by a Federal court of appeals and subsequently paid in full. Under appellants' theory, such assessments could not be used as evidence in a subsequent hearing, the reason being that an appellant could always argue that it had "settled" the matter, rather than incur the expense of filing a petition for certiorari with the Supreme Court. We reject such a view. We hold, therefore, that decisions of the Department which become final either by their rendition by this Board or by a failure of appeal from an adverse decision below, unless they are subsequently reversed or vacated, are properly considered in determining whether repeated trespasses have occurred.

Finally, appellants' argument that it is improper to use decisions of this Board which are on appeal in determining the question of the repeated nature of trespasses must similarly be rejected. Decisions of this Board are final for the Department, 43 CFR 4.1, and fully effective upon their issuance. We recognize that it is always possible that in subsequent judicial review any decision of the Board may be overruled. But until that eventuality occurs, any decision of this Board is presumptively valid. It is true that, should the Board rely

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on factual findings which are subsequently nullified, subsequent decisions premised on such earlier findings may, themselves, become vulnerable. Nevertheless, the idea that the Board may not give cognizance to its own decisions, on the mere possibility that they may be reversed at some time in the near or distant future, is hereby expressly rejected.

In any event, we find that the evidence adduced in this record before us of the trespasses occurring in 1977 and 1978, would, by itself, support findings of both "willfulness" and "repeatedness."

Judge Ratzman imposed damages of $1,400 for forage consumed, plus $2,870.90 for impoundment costs, and revoked appellants' grazing privileges which were attached to the Fly Ranch, Hot Spring Field, Deep Hole Ranch, Great Boiling Springs, Squaw Valley Ranch, Parker Properties, Granite Ranch, Finley Ranch, and Clear Ranch, for a period of 8 years. The evidence in this record clearly supports the assessment of both the damages and impoundment costs. With respect to the suspension of grazing privileges, we are not unmindful of the severity of this penalty. Nevertheless, we must agree with Judge Ratzman that appellants' willful and repeated violation of the grazing laws and regulations have indicated that no lesser action will work a reformation of appellants' operations on the Federal range. The revocation is affirmed in all respects.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed for the reasons stated herein.

James L. Burski
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge